

# The World of Law Clerks: Tasks, Utilization, Reliance, and Influence

Stephen L. Wasby

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# THE WORLD OF LAW CLERKS: TASKS, UTILIZATION, RELIANCE, AND INFLUENCE

STEPHEN L. WASBY\*

*This Article is an examination of the work of judges' law clerks, based on a variety of materials. It begins with consideration of who is a law clerk and of the role of staff attorneys and judges' secretaries. Clerks' tasks are examined next, with attention to the preparation of bench memoranda and judges' delegation of work to their clerks. Aspects of clerks' influence and the related matter of judges' reliance on them is then presented, including attention to law clerks' recommendations to their judges.*

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For this Article, among the materials used by the Author have been the papers of Judge Alfred T. Goodwin, Senior Judge, U.S. Court of Appeals for the Ninth Circuit, and the case files in those papers, to which the judge granted access and for which the Author thanks Judge Goodwin. The Alfred T. Goodwin Papers are housed at the Oregon Historical Society, Portland, Oregon. All survey and interview materials relied upon, which are on file with the Author, were carried out with restrictions on use of participants' names. The Author notes that the editors of the *Marquette Law Review* have not had the opportunity to review the Goodwin Papers, transcript of interviews and conversations, and copies of letters and emails.

## I. INTRODUCTION

This Article about the work of law clerks covers several topics: the tasks law clerks perform and judges' delegation to them and reliance on them, as well as reasons that law clerks chose their clerkships. The observations about these topics are drawn primarily although not exclusively from the federal courts. They stem from having been able to watch clerks at work in a judge's chambers, including their conferring with the judge about the next calendar's cases; reading much communication between clerks and judge in the case files of a senior federal appellate judge, who granted access to those files; and a survey of the judge's clerks on how they became clerks and, more directly relevant, the work they undertook for the judge.<sup>1</sup>

### A. Who Is a "Clerk"?

When we talk of "law clerks," of whom are we speaking? We usually think of someone employed directly by a judge and serving that judge for a year, but many district judges have two-year clerkships, and an increasing number of appellate judges have at least one clerk who serves for two years to provide continuity.<sup>2</sup> An increasing number of judges employ career clerks, or they may have one such clerk along with others rotating on a shorter-term basis.<sup>3</sup> And we must not forget that not only law clerks but also a judge's secretaries—sometimes with the newer title of judicial assistant (JA)—play a role in cases.<sup>4</sup> A secretary, for example, may, in the judge's absence, reply to procedural questions or requests for advice from other judges and, within chambers, may suggest options to her judge, both when requested and *sua sponte*.<sup>5</sup>

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1. For material drawn from that survey, see generally Stephen L. Wasby, "Why Clerk? What Did I Get Out of It?," 56 J. LEGAL EDUC. 411 (2006), and Stephen L. Wasby, *Clerking for an Appellate Judge: A Close Look*, 5 SETON HALL CIRCUIT REV. 19 (2008) [hereinafter Wasby, *Clerking*].

2. Judge Aldisert recently wrote that his sons had told him that, "although two-year clerkships made [his] work easier with a senior clerk always available to train the newcomer, it was not fair to the clerks" because of the student loan debt they had acquired. RUGGERO J. ALDISERT, *A Nonagenarian Discusses Life as a Senior Circuit Judge*, 14 J. APP. PRAC. & PROCESS 183, 195 (2013).

3. Judge Posner asserts that "[e]xcept for very weak judges, having a career clerk is a mistake, as it tempts the judge to delegate excessively to that clerk." RICHARD A. POSNER, REFLECTIONS ON JUDGING 34 (2013). For further discussion of delegation, see *infra* Part II.B.

4. See generally Stephen L. Wasby, *A Judicial Secretary's Many Roles: Working with an Appellate Judge and Clerks*, 7 J. APP. PRAC. & PROCESS 151, 155–66 (2005).

5. See, e.g., Memorandum from Adell Johnson to Judge J. Clifford Wallace, 9th Cir. (Aug. 28, 1987) (referencing *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 827 F.2d 407

### B. Staff Attorneys

To obtain a (more) complete picture of utilization of clerks, we need to look not only at judges' elbow clerks but also at staff attorneys who work for the court, usually for the Clerk of Court. Not only do staff attorneys evaluate cases for their "weight" so that argument calendars can be properly constructed or the cases can be directed to screening panels, but they also identify issues that might be the basis for grouping cases on an argument panel. More relevant here, they play a key role in the disposition of many of the very large proportion of cases decided with non-precedential rulings, whatever the name given those rulings in a particular court.<sup>6</sup> Indeed, for cases decided by screening panels, the staff attorneys are the clerks who work with the judges, whose elbow clerks often do not see those cases. While the judges on a screening panel make the determination of whether to retain a case on a screening panel calendar or to "kick" it to an argument/merits panel—and any one member of a screening panel can do that—the staff attorneys will usually have prepared a proposed memorandum disposition in lieu of a bench memo, and the judges most often accept that disposition as their own.

If the complement of staff attorneys is large, the court may have subject-matter specialization; for example, the Second Circuit has both habeas attorneys and immigration attorneys. By contrast, elbow clerks are generally expected to be generalists, dealing with all types of cases that come to the general jurisdiction federal courts, although, in chambers with multiple clerks, each set of clerks may be able to develop a specialty or to indulge preferences.

The distinction between staff attorneys and law clerks, with the latter serving an individual judge for one or two years and the staff attorneys having longer tenure, is a useful one, but the distinction may tend to blur. For one thing, judges' use of career clerks means that length of service alone would not distinguish them from staff attorneys.

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(9th Cir. 1987), *aff'd en banc*, 890 F.2d 139 (9th Cir. 1989)); Memorandum from Judge Herbert Choy, 9th Cir., to Adell Johnson (Jan. 4, 1988) (same); Memorandum from Adell Johnson to Judge Alfred T. Goodwin [hereinafter ATG], 9th Cir. (Jan. 25 1988) (same).

6. It is important to keep in mind the observation by Judge Diane Sykes (7th Cir.) that an important distinction between the U.S. Supreme Court on the one hand and state high courts and the U.S. Courts of Appeals on the other is that in the latter, it is staff attorneys who select cases, whereas in the U.S. Supreme Court, the Justices do so—of course aided by memoranda from the law clerks while they serve in the "cert pool." Panel Discussion, *Judges' Perspectives on Law Clerk Hiring, Utilization, and Influence*, 98 MARQ. L. REV. 441, 450 (2014).

In addition, from time to time, staff attorneys serve as de facto elbow clerks. They may be borrowed by judges for one or more cases, or they may move to a judge's chambers for a period of time to experience working directly for a judge. In addition, when a motions panel—for whom staff attorneys do the work—is faced with a large case that requires extensive treatment, for example, when a preliminary injunction is sought against a new municipal ordinance, a staff attorney may well perform the same tasks for the judges on the panel that in-chambers clerks would usually perform.

## II. LAW CLERKS' TASKS

What tasks do law clerks perform? Those who clerked for Justice Alfred T. Goodwin<sup>7</sup> on the Oregon Supreme Court in the 1960s agreed that their tasks were principally to review the briefs, to verify citations or references to the record or to determine that the authorities cited were accurately stated, and at times to read the transcript, with “cite-checking . . . a big part of the job.”<sup>8</sup> Sometimes the research would extend to seeking out other authorities, and there might be “additional legal research on trouble issues.” As one clerk said of the judge, “He told me what to research and I did it,” and another observed that the justice “delegated a fair amount of research and brief reviewing.” The clerks would convey their conclusions and any suggestions through written memos, or they might (also) discuss with the judge what they had discovered. While judges regularly use clerks to do research, they may differ in the purpose of that research. One of Judge Goodwin's later Ninth Circuit clerks has said that the judge used clerks for research to help him determine if he was right, whereas other judges, less familiar with many areas of the law, deployed their clerks to educate them about the law. In the course of responding to documents as a case is processed, law clerks may also seek information for themselves. Thus, in writing to his judge about how the judges should respond to a petition

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7. After four years at a Eugene, Oregon, law firm, Judge Goodwin began his career on the bench with an appointment to the Circuit Court for Lane County. In 1960, he was appointed to the Oregon Supreme Court. After nine years on the Oregon Supreme Court, President Nixon appointed Judge Goodwin to the United States District Court for the District of Oregon, where he served until his appointment in 1971 to the United States Court of Appeals for the Ninth Circuit. Serving as Chief Judge of the Ninth Circuit from 1988 to 1991, Judge Goodwin has continued to hear cases since assuming senior status in 1991. See Stephen L. Wasby, *Alfred T. Goodwin: A Special Judicial Career*, 15 W. LEGAL HIST. 9 (2002).

8. Unattributed quotations are taken from interviews of Judge Alfred T. Goodwin's law clerks, undertaken on the condition of anonymity of the interview responses.

for rehearing en banc to suggest that the panel seek a response to the petition, the clerk indicated such a response would benefit not only the panel but himself:

On December 7, we received a petition for rehearing and a petition for rehearing en banc. . . . The most important point made by appellees in their petition concerns a case that was filed by this court on October 21, 2010, *Ahcom, LTD v. Smelding*, 2010 WL 4117736 (9th Cir. 2010). In light of that new holding, I believe the panel would benefit from, and certainly I would benefit from, a response to the en banc petition from the prevailing party.<sup>9</sup>

Judge Goodwin wrote his own opinions—in earlier years, at a stand-up desk—so opinion-drafting was not a major role for his clerks.<sup>10</sup> As a clerk observed, “By and large he was the sole author.” Although on occasion a clerk might be asked to draft portions of an opinion, a request to review and critique the judge’s draft opinion was more likely. The judge would do the first draft and then ask for a cite check, at which point the clerks would return with comments as well. To the extent clerks’ input on proposed opinions was needed, the judge would be reliant on them, but not in the sense in which judges are criticized for letting too much flow into clerks’ hands. As put by a former clerk of Judge Richard Posner, who writes his own opinions, “[H]e wanted someone to be his critic—to match wits with him intellectually, to fight with him and tell him why he was wrong.”<sup>11</sup>

Judges who seek their clerks’ reactions to proposed opinions appreciate the comments they receive. An indication of Judge Goodwin’s appreciation of his clerks’ contributions came when he was sitting in the south Pacific and did not have their assistance. He told a court attorney in the Federated States of Micronesia, “I certainly don’t mind editorial help on my opinions. I depend on my law clerks to help with that sort of thing at home, and when on the road, I miss my clerks

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9. Memorandum from Timothy Ream, Law Clerk, to ATG (Dec. 8, 2010) (referencing *Schwarzkopf v. Briones*, 626 F.3d 1032 (9th Cir. 2010)).

10. See the link Judge Posner draws between a judge writing his or her own opinions and the basis for selecting clerks: “The judge who writes his own opinions will place less, and maybe no, emphasis on writing skills in selecting law clerks, and more emphasis on knowledge, intelligence, and research skills.” POSNER, *supra* note 3, at 33.

11. Jeff Sommer, *Defending the Open Internet*, N.Y. TIMES, May 11, 2014, at BU1 (quoting Tim Wu) (internal quotation mark omitted).

and their valuable suggestions, as well as their research.”<sup>12</sup> In the same vein, a current state supreme court justice has observed that “[t]he product is not as good when there’s only one person involved,” rather than involving the clerks in producing the result.<sup>13</sup>

Because Judge Goodwin was “such a good writer,” clerks’ language did not often appear in his opinions, although a few of their phrases might be included. Instead, their suggestions were sometimes included in opinions “in nuances,” or some authority or line of reasoning they had found that was not in the briefs “would find its way in.” Looking back, Justice Goodwin has recently observed about his Oregon Supreme Court cases, “I was a better writer before I began to rely so much on law clerks,”<sup>14</sup> and he also stated that in due course on the court of appeals, his opinions became what he has called “recycled bench memos.” Part of his better writing on the Oregon Supreme Court may have been that he did not have several law clerks, as U.S. Court of Appeals judges now have; state supreme court judges continue to have fewer clerks, which leads them to place less reliance on their clerks and perhaps also to write fewer separate opinions.<sup>15</sup>

Judge Goodwin’s observation fits with comments by Judge Richard Posner that opinions now are more legalistic because they are more likely to be written by law clerks than was the case earlier.<sup>16</sup> Law clerk-written opinions may be more formulaic and judge-written opinions may be more individualized, but Albert Yoon shows that over time, the opinions of judges known to write their own are more stylistically consistent, while the style of opinions signed by other judges who rely more heavily on clerks for opinion-drafting can vary substantially from one year to the next.<sup>17</sup> Reinforcing that finding, another judge said that if a judge’s style changes from year to year, it shows that the clerks write

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12. Memorandum from ATG to Clark Reffner (May 16, 2007) (referencing *Wainit v. Federated States of Micronesia*, Appeal No. C2-2006).

13. Panel Discussion, *supra* note 6, at 454 (comment by Justice David Stras).

14. Email from ATG to author (April 29, 2011, 6:20 PM EDT).

15. The writing of few separate opinions was suggested by Justice David Stras of the Minnesota Supreme Court. David R. Stras, *Secret Agents: Using Law Clerks Effectively*, 98 MARQ. L. REV. 151, 172, 175–76 (2014).

16. “[T]oday most judicial opinions are written by law clerks, which was not true a century ago, when very few judges even *had* law clerks . . . and was less true decades ago, when judges had fewer law clerks and law still had a writing culture.” RICHARD A. POSNER, *HOW JUDGES THINK* 221 (2008).

17. See Albert Yoon, *Law Clerks and the Institutional Design of the Federal Judiciary*, 98 MARQ. L. REV. 131, 142–43 (2014).

the opinions; he further observed that at the end of their year, clerks tend to write more like “their” judge.<sup>18</sup>

In addition to drafting opinions or commenting on what their judge has drafted, law clerks play an important role in commenting on opinions coming from other judges. Indeed, at times the monitoring clerk for a case sees and comments on an incoming opinion from another judge on the panel before the clerk’s own judge sees it, so that the judge reads that opinion with the clerk’s views in hand. The clerk can affect those incoming opinions when the clerk prepares a comment memorandum on one, the clerk’s judge then sends it to the writing judge with minimal changes, and the law clerk’s proposed edits to the opinion are adopted by the writing judge.<sup>19</sup> Thus, when judges note editorial changes to be considered by the writer of an opinion, the clerk is likely to have initiated the content of such a message, in addition to the “nit memos” (lists of technical and style changes) prepared by clerks to be sent to the author, either under the judge’s name or through the judge but clearly indicated as having been prepared by a clerk.

Judges may also specifically ask for reactions to particular arriving opinions<sup>20</sup> or may also task the clerk to watch for the presence of particular matters in the opinions of certain other judges. For example, Judge Goodwin would instruct his clerks to read with particular care the opinions of judges thought to have agendas to be sure that those judges did not insert dicta in those opinions for use in later cases. This is part of the internal monitoring that takes place as a result of other clerks and judges looking at the same matters.<sup>21</sup>

#### A. Bench Memos

One of clerks’ tasks is the preparation of bench memoranda for each case. Most often, these are written only for the clerk’s judge, although the judge might then share them with other members of the court. Clerk preparation of bench memos, part of clerks’ involvement in the

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18. Panel Discussion, *supra* note 6, at 454 (comment by Judge James A. Wynn, Jr. (4th Cir.)).

19. See, for example, the exchanges with regard to *Newton-Nations v. Betlach*, 655 F.3d 1066 (9th Cir. 2011), *amended by*, 660 F.3d 370 (9th Cir. 2011).

20. See, e.g., Note on Face of Another Judge’s Proposed Opinion from ATG to Barbara Reeves, Law Clerk (referencing *United States v. Systron-Donner Corp.*, 486 F.2d 249 (9th Cir. 1973)) (“I need the advice of at least one law clerk on this. It may turn into a lot of work.”).

21. Carolyn Shapiro, Comment at Marquette University Law School Conference, *Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks*.



early stages of considering cases, is quite important because through them the clerks may help frame the issues the judges consider or on which they focus. Based on the briefs, a clerk's memo to the judge might identify issues to which attention should be paid, that is, which issues are particularly important, and clerks may introduce issues beyond those raised in the briefs. As part of the bench memo (or separately), the clerk may also pose questions to be asked of counsel at argument; if those questions are used, the clerk has helped affect the content and tone of argument. Clerks' contributions through their bench memos are likely to be greater in more complex cases because, although the judge may devote more time to the more complex cases, the clerk has more time than the judge to devote to the case, giving the clerk an "information advantage." However, the judge's greater experience provides heuristics used to cut through many cases.<sup>22</sup>

When a court, like the Ninth Circuit, uses shared bench memos,<sup>23</sup> the clerk in one chambers helps set the tone not only for the writing clerk's judge but for all three members of the panel. That tone includes both the issues on which the case is to focus and it may also include the disposition the writer of the memorandum recommends.<sup>24</sup> Of course, the other judges may disagree, or their clerks might disagree with the bench memo and prepare response memos. Ninth Circuit bench memos are most often circulated unreviewed by the judge, so the judge is not committed to the law clerk's recommendations, and those recommendations are not always followed even by the clerk's own judge. While some judges note their general agreement with the memo's recommendations, others may distance themselves from the recommendation ("I do not necessarily agree . . .") and may even state disagreement with it.<sup>25</sup> So judges clearly do not feel held to the position proposed by their own clerks, although there may be some pull in that direction, especially when the judge does not especially familiarize himself with the case.

When response memos are prepared, at times they are then shared with the other panel members, and a sort of dialogue among the

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22. Wasby, *Clerking*, *supra* note 1, at 91.

23. Only a few U.S. Courts of Appeals use shared bench memos, and several Ninth Circuit judges opt out.

24. Stras, *supra* note 15, at 177; Panel Discussion, *supra* note 6, at 450 (comment by Judge Diane Sykes).

25. "For the first time in several years, my clerk is more willing to affirm than I am." Memorandum from ATG to Panel (May 29, 1975) (accompanying bench memo in *United States v. Evans*, 519 F.2d 1083 (9th Cir. 1975)).

clerks—while most often formally through the judges—takes place. Thus, in one immigration appeal, there was an initial bench memo prepared by an extern to a district judge sitting by designation on a panel, a response memo from the clerk of one of the other panel members, and a further response from the writer of the first memo in which positions initially taken were altered.<sup>26</sup> Despite the use of response memos, in busy chambers the path of least resistance may be to accept the bench memo's arguments unless they are thought quite out of line. Thus, the bench memo becomes the default agenda-setting device.

Shared bench memos affect the style of opinions. If the bench memo is prepared by Judge *X*'s chambers, two things are likely to result: (1) Judge *X* is likely to receive the writing assignment for the panel unless Judge *X* were to dissent, and (2) the draft opinion will be based on the bench memo. The latter can result in treatment of some issues more extensively than is necessary unless the judge intervenes to strike some of the material. There is also the risk that in transforming the bench memo into an opinion, the law clerk will adhere more closely to the original bench memo language than to the direction laid out in the post-argument conference memorandum from the panel's presiding judge (indicating the judges' positions, the result, and the writing assignment). For example, in a case in which the bench memo had recommended reversal, at conference the panel decided to affirm. When a proposed opinion was circulated, another member of the panel pointed to the conference memo for his understanding of the panel's position and commented, "Rather than take this route, the opinion reverts to the bench memorandum's approach, analyzing the entire NWA under an 'intermediate scrutiny' standard."<sup>27</sup> The extent to which a bench memo can guide judges' actions is seen in conference memos indicating that the judges "agreed with the bench memo" or decided to affirm "for the reasons set forth in the bench memo";<sup>28</sup> this is a further indication that clerks frame matters.

While clerks' bench memos play an important role in the outcome of a case, and particularly in what a disposition (opinion or memorandum) says, at times, and usually in simpler cases, instead of a bench memo the

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26. See the exchange of communication with regard to *Garcia Tellez v. Holder*, 07-72366, 451 F. App'x 655 (9th Cir. 2011).

27. Memorandum from Judge J. Clifford Wallace, 9th Cir., to Panel (Aug. 4, 2004) (referencing *Sagana v. Tenorio*, 384 F.3d 731 (9th Cir. 2004)).

28. Wasby, *Clerking*, *supra* note 1, at 58.

clerks prepare a proposed, non-precedential memorandum disposition which also performs the bench memo function. In that situation, it is clear the clerk is writing the court's disposition.

### B. Delegation

In considering the tasks law clerks perform, judges' delegation of those tasks—a critic might say abdication of responsibility for judicial duties—to clerks is quite important. Over time and particularly during his long service in the Ninth Circuit, Judge Goodwin came to delegate much to his clerks. While some view judges' delegation to law clerks negatively, such delegation, particularly if accompanied by guidance, can be functional in harnessing the strengths of staff so that they can contribute to the judge's work rather than having the judge involved in minutiae.<sup>29</sup> And, as a clerk has suggested, the judge can determine both generally and for each case the role the judge wishes the clerk to play. In particular, a judge would be sure to use a clerk's special strengths—strengths for which the judge might have hired the clerk. For example, a judge might make sure to have a law clerk with experience clerking for a district judge so that the clerk knows how to read a record in order to be able to turn to that clerk for that purpose.

In any event, a judge's delegation of tasks to clerks is unavoidable, and a judge has said about having clerks draft opinions that one can't put that “genie . . . back in the bottle” given the caseload facing the courts—the U.S. Courts of Appeals in particular.<sup>30</sup> That delegation is unavoidable and that it has increased over time does not, however, mean that it takes place across the board. Instead, it may take place more with some types of cases than with others. For example, there may be some subject-areas in which a judge is less interested or less well-informed and thus will leave more to the clerk than in areas of great interest to the judge or ones with which the judge is familiar.<sup>31</sup> More generally, as the late Ninth Circuit Judge Joseph Sneed observed, less complex cases “easily can be assigned to clerks without elaborate instructions” while the judge devotes more attention to more complex

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29. *See id.* at 82–83.

30. Panel Discussion, *supra* note 6, at 453 (comment by Judge Diane Sykes). Could it be that the “non-delegation doctrine,” generally dead in administrative law, is also dead in judicial chambers? And for similar reasons, that is, that there is so much work, the principal (the legislature or, here, the judge) cannot do it all and must have “helpers,” whether administrative agencies or law clerks? This intriguing suggestion comes from Erin Kaheny.

31. Professor John Szmer, Comment at Marquette University Law School Conference, *Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks*.

ones, but “as the volume of ‘tough and complex’ cases grows, each of us feels compelled to assign initially to clerks what a few years ago we might have considered a case deserving initial, intense, and thorough consideration by the judge with some intensely guided assistance by the elbow clerk.”<sup>32</sup>

In addition, the judge’s role conception—the expectations of how the judge should function in the judicial system and the judge’s view of his or her institutional role—will affect delegation to clerks and, more broadly, the ways in which the judge uses them.<sup>33</sup> Thus, what is delegated—or what is considered appropriate to be delegated—varies by judge. Some judges will consider a certain task non-delegable, while another judge might consider the same task one that could be given to a clerk.<sup>34</sup> Stating matters this way suggests that delegation is done consciously by the judge; it may be unintended or a matter of slippage, particularly if a judge is aging or ill, which would serve to limit the judge’s supervision of clerks.<sup>35</sup>

These comments about increased delegation bring us to the notion of *trajectory*. Just as there is variation among judges in the extent to which they delegate work, particularly opinion-drafting, to clerks, there may also be variability in delegation over the course of any individual judge’s career. Of course, if a judge—say a former law partner in a large firm, accustomed to supervising associates—engages in considerable delegation from the beginning, that practice or habit is unlikely to change. However, particularly if the judge is young at time of appointment and thus not far distant in age from the clerks, a greater sharing of work may well result; the judge’s greater energy at a younger age may also lead the judge to undertake much of opinion-writing. There is likely to be increasing delegation as a judge ages and slows down, although increased delegation may also stem largely from increased caseload, particularly on mandatory jurisdiction courts like the U.S. Courts of Appeals or state intermediate appellate courts.

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32. Law Clerk Hiring Problems: Are They Symptoms of “Case Overload” in the Circuits?, Memorandum from Judge Joseph Sneed, 9th Cir., to Associates (March 4, 2002).

33. See Panel Discussion, *supra* note 6, at 444, 454–55.

34. See *id.* at 452–55.

35. For the suggestion that “[t]he weakened condition of Brennan and Marshall meant that their clerks weren’t as well supervised as in previous years,” see JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDER STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 77 (2007).

## III. INFLUENCE AND RELIANCE

A. *Influence*

At the core of questions about judges' law clerks is their *influence*. The existence and extent of clerk influence may depend on perspective—whether that of the judge or the clerk. Illustrative are messages on a collective clerks' Christmas card to Judge Goodwin. One clerk wrote, "Judge, You're like Santa. We're like Santa's elves," but another inserted a footnote which read "In other words, you get all the credit and we do all the work."<sup>36</sup> Clerks may both overstate their own influence because they are too full of themselves or lack perspective and understate that influence out of humility or because they do not understand their real effect.<sup>37</sup>

At an extreme, clerks are said to make basic determinations and to write the key language in opinions. Short of that, there are instances in which a clerk's action does affect the outcome. A Ninth Circuit case provides an example.<sup>38</sup> After there had been considerable back-and-forth within a panel over a case, a clerk discovered a procedural problem, leading to disposition of the case on the basis of that matter. A member of the panel was preparing to dissent; the majority opinion's author made changes to his opinion; changes were made to the dissent; then there were further changes to the majority opinion—when the clerk's discovery ended matters. The author wrote to his panel colleagues to say that he had been working further on the opinion.

Meanwhile, one of my law clerks matched up the two notices of appeal with the various papers appealed from and discovered that there was no judgment on a separate document as required by Fed.R.Civ.P.58 and our recent cases following *Indrelunas* (411 U.S. 216 (1983)).

Rather than invest the considerable additional time that would be necessary to satisfy my now ravenous curiosity about the substantive questions lurking in this case, it occurred to me that a better case might come along later . . . and that if we dismiss this appeal for want of jurisdiction, as I believe we must, we might be doing everyone a favor.

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36. Christmas card in files of Judge Alfred T. Goodwin.

37. Suggested by Tony Mauro, Comments at Marquette University Law School Conference, *Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks*.

38. *Housley v. United States*, 35 F.3d 400 (9th Cir. 1994).

And indeed the appeal was dismissed. Thus, in that case, the writing judge explicitly acknowledged the clerk's contribution to it, as he also did in writing to colleagues that "[a]t conference, we decided to affirm . . . on the grounds that all claims were time-barred. . . . My law clerk has since persuaded me that Housley's *Bivens* claims are not time-barred."<sup>39</sup> There are other times in which the acknowledgment that the judge has moved toward a clerk's position is more oblique, as when a judge, "[a]fter considerable internal conflict and a close review of the record," could not join a disposition.<sup>40</sup>

What do we mean by *influence*? The toughest test is that Person *A* exerts influence over another (*B*) only when *A* is able to get *B* to do what *B* would not otherwise have done. One does find instances in which a judge, having decided to vote a certain way in a case, is persuaded by a law clerk to change positions. However, those instances are rare. Judge Goodwin talks of "one case each year" when a clerk's view prevails over his—when the clerk presses the judge to adopt a position different from the one to which he was initially inclined.<sup>41</sup> And it would appear that the judge may be open to allowing that to happen, in one case a year, but that shows even further that the judge is in control. Perhaps more often, the judge, not being sure how to decide, asks the law clerk which way to move from dead center; in such situations, the law clerk's influence, if used cautiously, can be determinative. Thus, in a drug case involving a car search that led to a house search, Judge Goodwin wrote to his clerk, "I'm at a crossroad here" as to whether to hold the car search bad and apply the "fruit of the poisonous tree" doctrine or to say the car search was good and probable cause to arrest thus existed.<sup>42</sup>

While there are instances in which the clerk's view prevails, there are many more instances in which the "recommendation is left in the dust";<sup>43</sup> after all, the judge is the boss and is fully capable of saying "no" even if saying it more diplomatically. This is part of the larger matter that a law clerk's submitting work to a judge doesn't mean the judge will use it. And it must also be remembered that to talk about law clerk's influence is to assume that law clerks have positions and have

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39. Memorandum from ATG to Panel (n.d.) (referencing *Housley*, 35 F.3d 400).

40. Memorandum from ATG to Panel (June, 18 1996) (referencing *Campbell v. Chater*, 94 F.3d 650 (9th Cir. 1996)); see also Wasby, *Clerking*, *supra* note 1, at 90.

41. Wasby, *Clerking*, *supra* note 1, at 90.

42. Memorandum from ATG to David Kaye (referencing *United States v. Connolly*, 479 F.2d 930 (9th Cir. 1973)).

43. Wasby, *Clerking*, *supra* note 1, at 58.

recommended their adoption. While certainly some law clerks are quite brash and too certain of their views, more generally law clerks tend to be too deferential.<sup>44</sup> Particularly early in their tenure, they may be reticent to make recommendations, although they become less so toward the end of their clerkship. Indeed, it has been suggested that law clerks are less valuable to a judge in the early months of a clerkship.<sup>45</sup> They may not come forth with recommendations even when instructed by their judge to do so.<sup>46</sup> Or they may be unable to arrive at a recommendation, as we see when one law clerk admitted to vacillating, writing of the clerk's shift between alternative positions several times, at which point he "decided to pass the buck to you" while offering opinions on both sides of the issue.<sup>47</sup> It would be interesting to see if clerks who have worked for a few years before their clerkship—an increasing phenomenon, at least at the U.S. Supreme Court<sup>48</sup>—are more sure of themselves and thus more likely to make recommendations than those who clerk under the older "standard model" in which a clerkship directly follows law school. The effects might be similar if someone had served in multiple clerkships, as when someone takes a clerkship on a U.S. court of appeals after clerking in a state appellate court or a U.S. district court.

However, if clerks seldom "turn the judge around," are clerks without influence when they don't write opinions? The most basic aspect of a clerk's "influence" —better, the clerk's *effect*—is that all information provided to the judge is important, and the clerk is having an effect through providing that information, if only by undertaking research assigned by the judge (and not slanting it toward a particular result).<sup>49</sup> And it has already been noted that a bench memo, whether sent to the entire panel or written only for the clerk's judge, serves to frame issues in a case, certainly an important effect. And it has also been noted that a law clerk's comments on another panel member's

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44. Panel Discussion, *supra* note 6, at 451 (comment by Judge James A. Wynn, Jr. (4th Cir.)).

45. Joseph D. Kearney, *A Truth About Career Law Clerks*, 98 MARQ. L. REV. 13, 15 (2014).

46. Wasby, *Clerking*, *supra* note 1, at 57.

47. Memorandum from Susan Leeson to ATG (May 24, 1975) (referencing *Hunt-Wesson Foods v. Gross*, 73-2769 (case settled, no citation)).

48. See David Lat, Comments at Marquette University Law School Conference, *Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks*.

49. For a discussion of the information effect of clerks at the U.S. Supreme Court, see Zachary Wallander & Sara C. Benesh, *Law Clerks as Advisors: A Look at the Blackmun Papers*, 98 MARQ. L. REV. 43 (2014).

opinion may have an effect. When a law clerk is charged with drafting an opinion on the basis of the judge's known position and instructions, the clerk doesn't determine the result but may be able to persuade the judge to adopt a certain way of reaching the judge's preferred outcome,<sup>50</sup> and this is particularly important in precedential opinions.

There may be a considerable possibility of a clerk affecting the judge's opinion if the clerk is willing to criticize what the judge has written—and if the judge is open to such criticism. As to Judge Goodwin's proposed opinion in a search case, where the law clerk disagreed with the result, he wrote to the judge that he found the opinion's "parade of horrors . . . somewhat disingenuous."<sup>51</sup> Criticism could also be stronger and more persistent, as we see when a law clerk working on a tax case wrote several polite but direct memos to the judge about what was wrong with the opinion, in one invoking the agreement of his fellow clerk.<sup>52</sup> Thus, even if one can seldom say that a judge would or would not have done something "but for" a clerk's action, we can speak of clerks having an *identifiable role* in the judge's work—and that satisfies at least a minimal meaning of influence.

The focus of this Article is on clerks in the federal appellate courts, but the question of clerk influence also exists in state appellate courts. In one study, state supreme court justices were asked about clerks' role in the decision-making process, the judges' agreement with the clerks' recommendations, and the proportion of cases in which the judges changed opinions as a result of law clerk advice.<sup>53</sup> Generally, the judges spoke of making use of law clerks, but there was no suggestion that the clerks played a major role in the court's decisions.<sup>54</sup> The judges were much more likely to use their clerks for research than for recommendations.<sup>55</sup> Some did find law clerk recommendations highly influential but within the context that a clerk typically agreed with the

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50. Wasby, *Clerking*, *supra* note 1, at 92.

51. Memorandum from Law Clerk (Don) to ATG (Jan. 16, 1974) (referencing *United States v. Phillips*, 497 F.2d 1131 (9th Cir. 1974)).

52. Memorandum from Charles Adams to ATG (Dec. 19, 1975) (referencing *Thatcher v. Comm'r*, 533 F.2d 1114 (9th Cir. 1976)) ("Wayne and I both have misgivings about the result . . ."); *see also* Memorandum from Charles Adams to ATG (Jan. 21, 1976); Memorandum from Charles Adams to ATG (n.d.); Memorandum from Charles Adams to ATG (Feb. 19, 1976).

53. *See* Rick A. Swanson & Stephen L. Wasby, *Good Stewards: Law Clerk Influence in State High Courts*, 29 JUST. SYS. J. 24, 29 (2008).

54. *Id.* at 31–32.

55. *Id.* at 32.



judge's inclinations.<sup>56</sup> Judges' dominance in the process is seen more clearly when they were asked the percent of cases in which clerks' recommendations changed an opinion: the mean and median responses were less than ten percent.<sup>57</sup> Thus, the authors concluded that clerk *research*, rather than *recommendations*, affects the judges.<sup>58</sup> However, reinforcing what was noted earlier as to bench memoranda, there was a greater clerk effect if the clerk worked on the case first rather than after the judge had begun work on it.<sup>59</sup> And the judges certainly were clear that they were in charge.<sup>60</sup> In considering these findings, it must be kept in mind that when, as here, the judges were being asked for their views, they might well be inclined to minimize law clerk influence.

### B. Reliance

An aspect of law clerk *influence* on judges is the judges' *reliance* on the clerks. If a law clerk and a judge work together, or at least in parallel, on a case, the law clerk may have a slight, but not great, informational advantage concerning the case, and in that situation, the judge and clerk can engage each other's views. If, however, a judge lets the law clerk carry the burden of work on a case, the law clerk's information advantage may be substantial, thus increasing the possibility of that clerk's influence over the judge in decisions related to the case. Judges vary in the extent of their reliance on clerks, with some seemingly unable to function in the short run if the clerk associated with a case is absent.

As a general matter, when consideration of a case in the U.S. Court of Appeals continues into the early summer, one can find judges calling on each other to complete work on it before the law clerks working on the case leave. For example, in sending an opinion for consideration, a judge acknowledged that law clerks might be changing: "I realize that law clerks come and go and this may be dropping on your desk during a period of transition."<sup>61</sup> He therefore asked that if his panel colleagues had major problems with this opinion, he "would appreciate an early warning," indicating that he wished his current clerk to be able to finish work on the case: "I would like to get as much help as possible from my

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56. *Id.* at 35–36.

57. *Id.* at 41 & 42 tbl.5.

58. *Id.* at 44–45.

59. *Id.* at 34.

60. *Id.* at 40.

61. Memorandum from ATG to Panel (June 7, 1993) (referencing United States *ex rel.* Richards v. De Leon Guerrero, 4 F.3d 749 (9th Cir. 1993)).

current law clerk who has spent about six months on this case before she goes off to billable time.”<sup>62</sup>

In a different case, a judge wrote to his colleagues, “We are at the cusp of a law-clerk year and if we get into an intra-panel dispute, which no doubt would invite en banc traffic, we would have new law clerks working on material that our chambers have already spent a substantial amount of time in considering,” and more delay would be created.<sup>63</sup> And in still another case, the judge wrote to his panel colleagues, “Please, if you can while your incumbent law clerks are still around, give me a decisive vote on what each of you think we should do about jurisdiction,” and a fellow panel member wrote shortly thereafter, “It would be helpful to me if we could conclude this matter before the present law clerks leave.”<sup>64</sup> Of course, comments like this may only reflect a concern that if the case “goes over,” a new clerk will have a steep learning curve in an ongoing matter, but more seems to be involved.

When a judge—perhaps a moderate or less explicitly ideological judge—is not firmly committed to a position in a case and is also highly reliant on clerks and the case carries over from one set of clerks to the next set, the judge may be more likely to shift position on the basis of the recommendations made by the new clerk. On the other hand, a judge with a firm ideological stance is likely to be more impervious to shifts in the positions taken by clerks who work on a case over time.

Judges’ reliance on clerks is also thought to affect a panel’s willingness to take a case back after a district court decision on remand from the panel. When a court of appeals panel has remanded a case for further action in the district court, the case may return after the passage of considerable time, with all panel members now having new clerks. When the panel is asked by the Clerk’s office whether it wishes to take the “comeback” case, the judges of the panel often vote to reject the case, sending it to another panel. However, at least one judge has argued that the actions of the district judge on remand may have resulted from the panel’s disposition and thus the panel should take the case back to “clean up its own mess.”<sup>65</sup> When that judge volunteers to

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62. *Id.*

63. Memorandum from ATG to Panel (Aug. 14 1997) (referencing *United States v. Doe*, 122 F.3d 1074 (9th Cir. 1997) (unpublished table decision)).

64. Memorandum from ATG to Panel (July 7, 2005) (referencing *Santos v. Guam*, 436 F.3d 1051 (9th Cir. 2006)); Memorandum from J. Clifford Wallace, Judge, 9th Cir., to Panel (July 13, 2005) (same).

65. From various instances in cases in which Judge Alfred T. Goodwin participated.

write for the panel should it take the comeback case, his colleagues are often willing to accept the case when they would not otherwise have been willing.

### C. *Recommendations, Ideology, and Selection*

The extent to which judges accepted clerks' recommendations and relied on clerks may be related to ideology, particularly in types of cases in which the underlying statutory or constitutional language to be interpreted is vague and the subject is controversial—think immigration or search and seizure. The “ideological distance” between clerk and judge may condition the clerk's effect. If clerk and judge share the same basic outlook, they would likely come out at the same place even without use of words like “recommendation.” And situations of minimal ideological distance occur when judges select their clerks for ideological compatibility or prospective law clerks apply for clerkships based on the judges' ideology, something thought to be the case for those with Federalist Society memberships and for those with comparable liberal affinities.<sup>66</sup> More generally, self-selection often brings clerks of a certain view to judges of similar views, at least as the prospective clerk perceives those views.

However, at times there is not an ideological match. In addition to speaking of wanting “new blood” and up-to-date legal learning in chambers, quite a number of judges select at least some of their clerks for views that differ from their own, as seen in the report by a clerk that her judge, thought to be moderate to conservative, told her, “You are my liberal clerk for this year.” Such a statement does not mean that the clerk is there for window-dressing, as the judge may indeed wish to be challenged and thus be more, not less, likely to accept recommendations of a clerk who comes at problems from a perspective different from the judge's.

Perhaps more important, in choosing the judges to whom they will apply, not all prospective clerks select on the basis of ideology, or it may be but one of a number of factors.<sup>67</sup> Indeed, law students seek clerkships for a variety of reasons. One might be to participate in the development of the law, perhaps regardless of the direction it would take; this is related to wanting to understand better the process by which the judicial system operates, perhaps for use in the clerk's later career,

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66. See Swanson & Wasby, *supra* note 53, at 36.

67. This paragraph draws on Wasby, “*Why Clerk? What Did I Get Out of It?*,” *supra* note 1.

say as an appellate litigator, for the benefit of future clients. A would-be clerk may wish to hold a clerkship in a particular location and thus might not be selective as to which judge there would provide a satisfactory clerkship, perhaps even applying to all judges there regardless of their ideological orientation, just as it is now apparent that those seeking clerkships at the U.S. Supreme Court routinely apply to all the Justices. Or the choice of a clerkship may depend on having a good working relationship that includes close interaction with the judge, as when it may be clear that to clerk for a particular judge is to be far more involved in working directly with the judge than in other chambers. Think of the clerks of a particular judge who came to know a judge down the hall better than they knew their own judge, who imposed “distance” between judge and clerks. A clerk who had held one clerkship, having liked that situation, might seek another.

These various reasons are not merely of interest for their own sake. They may affect the role the clerk plays in a judge’s chambers, just as a judge’s role affects the use of law clerks, and they could well affect clerks’ recommendations and judges’ receptivity to them. Thus, if someone applied for a particular clerkship because of agreement with the judge’s ideology, we might expect the clerk to make recommendations to the judge on cases because the clerk would know (or at least assume) that clerk and judge were on the same wavelength, and there would be little need for the clerk to press the judge—unless the clerk was more avid ideologically and wanted to carry the judge further. However, someone who took a clerkship to learn about the process of the law might be less likely to press the judge for a particular result. The same might be true of those who sought a clerkship as breathing space after law school while figuring out what to do next.

#### IV. CONCLUDING COMMENTS

Law clerks are, without question, an essential part of the judiciary. Without them, judges with heavy and increasing caseloads would be able to decide far fewer cases. Judges need both their own elbow clerks and those who serve the court as a whole. Once it is recognized that courts cannot function without clerks, one can debate such matters as the extent to which judges rely on them and whether the clerks have undue influence on “their” judges. The same caseload considerations that make clerks necessary also make it likely that judges’ reliance on them will be more than minimal and that it will have increased over time. The extent to which that reliance gives the clerks influence is determined by a number of factors, which have been discussed in this

Article. However, ultimately the extent of reliance and influence is for the judge to decide, either consciously or implicitly by letting certain types of decisions slide to the clerks.